Public Prosecutor v Anuar Layani bin Saidon

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVIEW NO 43–23 OF 2001

AUGUSTINE PAUL J

31 MAY 2001

Criminal Procedure *— Sentence — Whipping — Age of offender — Offender above 50 years old at time whipping is to be inflicted — Whether court should remit sentence — Criminal Procedure Code s 289*

The respondent had pleaded guilty and was sentenced to 12 months imprisonment and was ordered to be given two strokes of the rotan. He served his term of imprisonment. The issue for determination was whether in view of s 289 of the Criminal Procedure Code he could now be punished with whipping even though he was more than 50 years of age.

Held, remitting the sentence of whipping:

(1) Section 289 provides in clear terms that males whom the court considers to be 'more than 50 years of age' shall not be punishable with whipping. In this case, when the sentence of whipping was ordered on 2 November 2000 the accused was exactly 50 years of age. He was therefore not 'more than 50 years of age' at that time. The sentence ordered was therefore correct in law (see p 517G–H).

(2) The word 'punishable' in s 289 refers to the age of a person at the time of imposition of a sentence of whipping and at the time of its infliction. This means that a sentence of whipping cannot be imposed on a male who is more than 50 years of age at the time sentence is passed, and, if passed when he was 50 years of age or less at that time it cannot be inflicted if he is more than 50 years of age at the time of its infliction. This view is consistent with the object of s 289, which is to forbid whipping in the case of males who are more than 50 years of age (see p 518E–F).

(3) The only appropriate remedy available in this case is to treat the proceeding before it as an appeal against sentence under s 325 read with s 316 of the Criminal Procedure Code and confirm or enhance the term of imprisonment that has been ordered after having remitted the sentence of whipping so as to come as close as possible to s 291(1) which provides for the procedure to be followed when a sentence of whipping cannot be inflicted. As the term of imprisonment that had been ordered was sufficient against the background of the plea made by the accused, the court remitted the sentence of whipping and confirmed the sentence of 12 months' imprisonment that had been ordered by the learned magistrate (see p 519B–D).

[**Bahasa Malaysia summary**

Responden telah membuat pengakuan bersalah dan telah dijatuhkan hukuman penjara 12 bulan dan telah diperintahkan untuk diberikan dua sebatan rotan. Beliau telah menjalani tempoh penjara beliau. Persoalan yang perlu ditentukan adalah sama ada beliau boleh sekarang ini dihukum sebat walaupun beliau melebihi umur 50 tahun berdasarkan s 289 Kanun Acara Jenayah.

Diputuskan, meremitkan hukuman sebat tersebut:

(1) Seksyen 289 memperuntukkan dengan jelas bahawa lelaki yang mahkamah mengambilkira sebagai 'melebihi umur 50 tahun' tidak sepatutnya dihukum sebat. Di dalam kes ini, apabila hukuman sebat diperintahkan pada 2 November 2000, tertuduh dengan tepat berumur 50 tahun. Beliau oleh itu bukan 'melebihi umur 50 tahun' pada masa itu. Hukuman yang diperintahkan oleh itu adalah betul di sisi undang-undang (lihat ms 517G–H).

(2) Mahkamah berpendapat bahawa perkataan 'boleh dihukum' dalam s 289 merujuk kepada umur seseorang pada masa pengenaan hukuman sebat dan pada masa ia dikenakan. Ini bermaksud bahawa satu hukuman sebat tidak boleh dikenakan ke atas seorang lelaki yang melebihi umur 50 tahun pada masa hukuman tersebut dijatuhkan, dan, jika dijatuhkan semasa beliau berumur 50 tahun atau kurang pada masa itu, ia tidak boleh dikenakan jika beliau melebihi umur 50 tahun pada masa ia dikenakan. Pendapat ini adalah konsisten dengan tujuan s 289, yang melarang sebatan dalam kes lelaki yang melebihi umur 50 tahun (lihat ms 518E–F).

(3) Di dalam keadaan ini, adalah pandangan mahkamah bahawa satu-satunya remedi sesuai yang ada adalah untuk menganggap prosiding yang di hadapannya sebagai satu rayuan terhadap hukuman di bawah s 325 dibaca bersama s 316 Kanun Acara Jenayah dan mengesah atau menambahkan tempoh penjara yang telah diperintahkan setelah meremitkan hukuman sebat tersebut untuk tiba sehampir-hampirnya kepada s 291(1) yang memperuntukkan prosedur yang diikuti apabila hukuman sebat tidak boleh dikenakan. Memandangkan mahkamah mendapati bahawa tempoh penjara yang telah diperintahkan tersebut adalah mencukupi berdasarkan latar belakang pli yang dibuat oleh tertuduh, mahkamah meremitkan hukuman sebat tersebut dan mengesahkan hukuman 12 bulan penjara yang telah diperintahkan oleh majistret yang arif (lihat ms 519B–D).]

Notes

For cases on whipping, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2029–2044.

Legislation referred to

Criminal Procedure Code ss 290, 291, 287(1), 289, 316, 325, Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(3)

Jagjit Singh (Attorney General's Chambers) for the applicant.
Respondent in person.

Augustine Paul J:. On 2 November 2000, Anuar Layani bin Saidon ('the accused') was charged in the Magistrates' Court at Kuala Lumpur with an offence under s 6(3) of the Drug Dependants (Treatment and Rehabilitation) Act 1983, which is punishable with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both. The accused pleaded guilty and he was sentenced to imprisonment of 12 months and was also ordered to be given two strokes of the rotan. The term of imprisonment was ordered to run from the date of his arrest, that is to say, 28 September 2000. He served his term of imprisonment and was due to be released on 28 May 2001. The prison authorities ascertained that he was born on 2 November 1950 and entertained doubts as to whether the sentence of whipping can be inflicted on him, as he had attained the age of 50 on the date the sentence was imposed and was now more than 50 years of age. Accordingly, they asked for clarification from the learned magistrate who sent the file relating to the case to the High Court for revision on 26 May 2001. I heard the proceeding on 29 May 2001 after having notified the parties.

It will be observed that in this case, the accused was born on 2 November 1950 and the sentence of whipping was imposed on him on 2 November 2000. On that day, he was exactly 50 years of age. The issue for determination is whether he can now be punished with whipping even though he is more than 50 years of age in view of s 289 of the Criminal Procedure Code ('s 289'), which reads as follows:

> No sentence of whipping shall be executed by installments, and none of the following persons shall be punishable with whipping:
>
> (a) females;
>
> (b) males sentenced to death;
>
> (c) males whom the court considers to be more than 50 years of age.

Section 289 provides in clear terms that males whom the court considers to be 'more than 50 years of age' shall not be punishable with whipping. In this case when the sentence of whipping was ordered on 2 November 2000 the accused was exactly 50 years of age. He was therefore not 'more than 50 years of age' at that time. The sentence ordered is therefore correct in law. However, the sentence of whipping cannot be inflicted on the day it was passed in view of s 287(1) of the Criminal Procedure Code which reads as follows:

> When the accused is sentenced to whipping in addition to imprisonment the whipping shall not be inflicted until after the expiration of seven days from the date of the sentence or, if the imprisonment extends to fourteen days until

> after the expiration of fourteen days from the date of the sentence, or if an appeal is made within that time until the sentence is confirmed by the appellate court.

Thus when the sentence of whipping is to be inflicted the accused will be more than 50 years of age. That raises the question of whether s 289(c) is restricted in its operation to the age of a person at the time he is sentenced or also extends to the time when the sentence is to be inflicted. In my opinion the answer to this problem lies in the meaning of the word 'punishable' in s 289. It is defined in *Black's Law Dictionary* (6th Edn) as:

> Deserving of or capable or liable to punishment; capable of being punished by law or right: *People v Superior Court of City and County of San Francisco* 116 Cal App 412, 2 PD 843, 844.

The word 'punishable' thus refers to a person who is capable or liable to punishment. The *Concise Oxford Dictionary (*9th Edn) defines 'capable' as, inter alia:

> ... having the ability, fitness, or necessary quality for ...

and the word 'liable' as, inter alia:

> ... legally bound, subject to, answerable.

Thus, a liability to punishment is a reference to punishment to which a person may be subjected or answerable to. This refers to the time when the punishment is imposed. A capability to punishment is a reference to ability or fitness for punishment. This refers to the time when the punishment is to be inflicted. I am therefore of the opinion that the word 'punishable' in s 289 refers to the age of a person at the time of imposition of a sentence of whipping and at the time of its infliction. This means that a sentence of whipping cannot be imposed on a male who is more than 50 years of age at the time sentence is passed, and, if passed when he was 50 years of age or less at that time it cannot be inflicted if he is more than 50 years of age at the time of its infliction. This view, to my mind, is consistent with the object of s 289 which is to forbid whipping in the case of males who are more than 50 years of age. I must add that the learned deputy public prosecutor readily agreed with this interpretation. It follows that the sentence of whipping cannot be inflicted on the accused as he was more than 50 years of age at the time it could have been done so.

The resultant matter for consideration is the procedure to be followed when a sentence of whipping that he has been imposed cannot be inflicted. Section 291(1) of the Criminal Procedure Code ('s 291(1)') deals with the procedure to be followed when a sentence of whipping cannot be inflicted due to medical grounds. The subsection reads as follows:

> In any case in which under the preceding section a sentence of whipping is wholly or partially prevented from being executed the offender shall be kept in custody till the court which passed the sentence can revise it, and the said court may in its discretion either remit such sentence or sentence the offender in lieu of whipping or in lieu of so much of the sentence of whipping as was not executed to imprisonment for a term which may extend to twelve months,

which may be in addition to any other punishment to which he has been sentenced for the same offence.

It will be observed that the power of revising the sentence provided by s 291(1) is restricted in its operation to cases falling within s 290 of the Criminal Procedure Code. This procedure cannot therefore be adopted to a case where a person on whom a sentence of whipping has been passed is more than 50 years of age at the time of infliction of the sentence. In fact, there is no other specific provision in the Criminal Procedure Code to resolve the problem as in this case. In the circumstances, it is my view that the only appropriate remedy available is to treat the proceeding before me as an appeal against sentence under s 325 read with s 316 of the Criminal Procedure Code and confirm or enhance the term of imprisonment that has been ordered after having remitted the sentence of whipping so as to come as close as possible to s 291(1). Accordingly, I asked the accused to show cause why the sentence of imprisonment should not be enhanced. He prayed for leniency and said that he has no previous convictions. As I felt that the term of imprisonment that had been ordered was sufficient against the background of the plea made by the accused I remitted the sentence of whipping and confirmed the sentence of 12 months' imprisonment that had been ordered by the learned magistrate.

Sentence remitted.

Reported by Wong Ee Lynn